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ATTORNEYS FOR
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and
STATE OF IDAHO,

Plaintiffs,

v.

ASARCO INCORPORATED, COEUR D'ALENE MINES CORPORATION, CALLAHAN MINING CORPORATION, HECLA MINING COMPANY, SUNSHINE PRECIOUS METALS, SUNSHINE MINING COMPANY,

Defendants.

Case No. CV94-206-N-EJL

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' REQUEST FOR FINAL RELIEF ON MOTION TO MODIFY CONSENT DECREE

Defendants Hecla Mining Company ("Hecla") and ASARCO Incorporated ("ASARCO") hereby reply to Plaintiffs' Response to Defendants' Request for Final Relief on Motion to Modify Consent Decree as follows.

I. INTRODUCTION

By Order dated September 30, 2001 ("Order"), this Court found that changed circumstances warranted modification of the Consent Decree but reserved ruling on an appropriate modification until after issuance of the Record of Decision ("ROD") for the Coeur d'Alene Basin Remedial Investigation/Feasibility Study. As the ROD for the Basin has now been issued, the Defendants have moved the Court for entry of final relief on the Motion to Modify. As set forth in the Request of Defendants Hecla Mining Company and ASARCO Incorporated for Final Relief on Motion to Modify Consent Decree ("Defendants' Request"), Hecla and ASARCO requested that the Court release the companies from further Box consent decree obligations.

The bulk of the Plaintiffs' Response to Defendants' Request for Final Relief on Motion to Modify Consent Decree ("Response") as filed by the United States and the State of Idaho is a thinly veiled motion to reconsider the Court's September 30, 2001 Order. The Plaintiffs' state:

> Plaintiffs continue to believe that the decision to use EPA's remedial authorities outside the Box (the change of circumstance at issue) has no legal or logical effect on the "burdensomeness' of Defendants' work obligation in the Box and cannot serve as a basis for modification of the Box Decree under Fed.R.Civ.P. 60(b)(5).

Response, p. 1, fn. 1

Further, they state that the Defendants:

> [H]ave failed to demonstrate that *any* relief would be justified by the changed circumstances found by the Court in its Order of September 30, 2001 ("Order").

Response, p. 2. After devoting virtually all of their brief to arguing that the Court's September 30, 2001 Order is wrong, and that the Defendants should have no relief whatsoever, they reluctantly conclude the pleading by suggesting that perhaps an appropriate remedy would be to relieve the Defendants of approximately $3 million in past costs claimed by the State and the United States. Response. p. 20.

As set forth in the Defendants' Request, the Court now has before it all of the information it needs in order to grant the final relief on the Motion to Modify the Consent Decree. In addition, the proposal set forth by the Defendants is both fair under the circumstances and supported by the record in this case. The Response of the Plaintiffs does nothing to either refute or undermine the Defendants' proposal.

II. DEFENDANTS' REPLY TO SPECIFIC POINTS RAISED BY PLAINTIFFS IN THEIR RESPONSE TO DEFENDANTS' REQUEST FOR FINAL RELIEF ON MOTION TO MODIFY CONSENT DECREE

Plaintiffs argue that "Defendants' potential liability for cleanup costs of environmental contamination outside the Box is not as large as once feared . . ." Response, p. 8. They note that the cost of the selected remedy of the 2002 ROD is estimated at $360 million in 2002 dollars and will be implemented over 30 years. They conclude that this has "substantially reduced the burden to the Defendants." It is, however, nonsensical to suggest that a $360 million cleanup, even spent over a 30 year time period, is not burdensome for companies with the limited financial wherewithal of a Hecla or an ASARCO.

Moreover, Plaintiffs themselves recognize that the 2002 ROD is an "interim" ROD and that after the first wave of remedial actions are implemented the US and the

State will decide whether more remedial actions might be appropriate. See Response p. 8, fn. 5. There are additional claims to natural resource damages as well. Finally, it is ironic that while terming the $360 million price tag as reasonable, the Plaintiffs admit that they originally estimated costs for implementing all of the work in the non-populated areas ROD for the Box at approximately $68 million but that the cost to date has almost doubled, to approximately $116 million. Response, p. 2. This does not bode well for the $360 million figure.

Plaintiffs make the somewhat disingenuous argument that "it is established that EPA's decision to use CERCLA remedial authorities in the Basin did not increase Defendants' cleanup obligations in the Box in any way." Response at p. 5. The issue as framed by the Court, however, is how onerous the added costs of the Basin ROD will be to ASARCO and Hecla as they try to also comply with the 1994 Consent Decree. Order at p. 10. Clearly, a potential liability of $360 million or more, even spread over 30 years, will make it much more onerous on ASARCO and Hecla to be able to implement the remaining obligations of the Bunker Hill Consent Decree. As the Court found: "Mr. Pfahl and Mr. Brown both testified that the demands being made under CERCLA, and not the market conditions, are bleeding the companies to death." Order at p. 10.

Plaintiffs argue that "Defendants have failed to demonstrate the difference between their potential liabilities for cleanup of the Basin under the 'multi-media approach' and as presently structured." Response at p. 7. To the contrary, over the six years between 1994 and 1999 the parties had actual on-the-ground experience in a "multi-media" approach at cleanup outside the Box. This experience is set forth in the

Defendants' Request at pp. 6-7 and in the Pfahl and Brown Declarations which are attached. See also, the Declaration of Charles W. Moss, attached to the Plaintiffs' Response, confirming the SVNRT mandate, priorities and funding. In their Response, the governments effectively concede at least a $250 million spread between the company-proposed $107 million cleanup plan and the ROD's $360 million price tag and then blithely ignore the enormous difference in those numbers. In sum, there is ample evidence to support the requested modification.

The governments also state that Hecla and ASARCO should be required to implement the Consent Decree requirements because of the public health risks involved here. Response, p. 3. Angela Chung, the EPA Remedial Project Manager actually makes the astoundingly categorical statement that, "Until each of these properties has been remediated, children residing within the Box will face a significant risk of elevated blood lead levels." Chung Affidavit, ¶5 (emphasis added).

Yet the governments, in their Response, apparently concede the companies' contention that the remedial action objective for the populated areas of the Box has already been met. Further, the governments presented no credible evidence of their inability to fund the remaining Box Consent Decree work if they believe (once they, rather than the companies, are footing the bill) that the additional work and expenditures are truly necessary.

Finally, as indicated above, the United States and the State of Idaho reluctantly suggest that if the Consent Decree must be modified, the modification be limited to elimination of the approximately $3 million which the Plaintiffs claim is currently owed

by the Defendants, Response at p. 20, $2.9 million, which was incurred as part of the parties' compromise on 2002 work requirements. Such a modification is clearly inadequate. The record at this juncture is clear. To date Hecla and ASARCO have spent approximately $44.7 million on implementation of the Box Consent Decree. The companies estimate future Box costs of $18.1 million. On top of that, they face a claim of liability by the United States government for remediation in the Coeur d'Alene Basin of $360 million, including a $90 million cost for yard cleanups outside the Box, a cost which likely will only escalate. Given the findings of the Court to date, and the magnitude of this increased liability, a $3 million set-off is clearly inadequate. Fairness dictates that ASARCO and Hecla be relieved of the remaining 1994 Consent Decree obligations.

III. CONCLUSION

For the foregoing reasons, Defendants request that the relief requested be granted.

Dated this 9th day of May, 2002

Respectfully submitted

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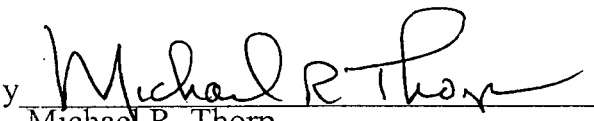
By 
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' REQUEST FOR FINAL RELIEF ON MOTION TO MODIFY CONSENT DECREE** were deposited in the United States mail, postage prepaid, this 9th day of May, 2002, addressed to the following:

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